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No. 06-989

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening and reply briefs remains correct.

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INTRODUCTION

On November 16, 2007, this Court directed the parties to file supplemental briefs addressing three questions concerning the existence of, and the parties' reliance on, authority outside the Federal Arbitration Act ("FAA") to enforce the judicial review provision of the parties' "Stipulation and Order Regarding Agreement to Arbitrate" (hereafter, the "Arbitration Agreement"). Pet. 4a-16a. The Court's questions implicitly recognize an important underlying fact: when the parties drafted the Arbitration Agreement and the district court entered that Agreement as its order, neither relied on the FAA as the source of the district court's authority to order arbitration or to provide legal-error judicial review of the award.

The FAA's applicability first became an issue in Mattel's initial appeal, long after the district court had reviewed the award under the terms of the parties' Agreement. Relying on *Kyocera v. Prudential-Bache Trade Servs.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. dismissed*, 540 U.S. 1098 (2004), Mattel argued for the first time on appeal – and the Ninth Circuit held – that the FAA prohibited enforcement of the parties' judicial review provision. Other than claiming that the FAA prohibited its enforcement, Mattel has never challenged the enforceability of the judicial review provision in the parties' Agreement under any state or federal law or as an impermissible exercise of the district court's authority.

PROCEDURAL STATEMENT

The Arbitration Agreement at issue stems from an attempt at alternative dispute resolution in federal

court litigation. Exercising its authority under Federal Rule of Civil Procedure 16(c)(9) and District of Oregon Local Rule 16.4, the district court ordered the parties to mediate their dispute. Jt. App. 3, Docket #60. As a result of that mediation, the parties agreed to submit the remainder of their claims to arbitration in which the arbitrator's legal conclusions would be non-binding and subject to the district court's review. In reporting the outcome of the mediation to the district court, the parties stated:

> [T]he parties agreed to seek to reach an agreement by which all remaining issues in the case could be resolved through "*contract arbitration*" that would require the arbitrator to prepare written findings of fact and conclusions of law and allow for judicial review of the arbitrator's legal rulings, including conclusions of law.

Jt. App. 46 (emphasis added; footnote omitted). The parties' use of the term "contract arbitration" in that report demonstrates that they each contemplated a method of consensual case management and court-ordered dispute resolution, rather than "statutory arbitration" under the FAA.

1. After negotiating the scope of the submission to the arbitrator, the parties jointly submitted their Arbitration Agreement to the district court for approval. The court entered the Arbitration Agreement as an order. Pet. App. 4a-8a. The wording of the Agreement makes clear that neither the parties nor the court intended the FAA's judicial review provisions to apply to the arbitration.

Paragraph 1 describes the parties' agreement, stating:

> The parties ... agree to arbitrate before one

> arbitrator all remaining issues not decided previously in this case by the Court.... The arbitrator shall prepare written findings of fact and conclusions of law that may be reviewed by Judge Jones at the request of either party, as more fully described in paragraph 27 of the Rules attached as Exhibit A hereto.

Pet. App. 5a. Paragraph 27 describes the grounds for vacatur or modification of the award, providing:

> The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

Pet. App. 16a.

In addition to specifying grounds for vacatur or modification, the parties also agreed to a specific procedure for securing judicial review. Paragraph 3 of the Agreement provides that "[a]ny request for review of the arbitrator's decision will be made by motion to Judge Jones[.]" Pet. App. 6a. Paragraph 24 further specifies that "[e]ither party may request that the Court set a briefing schedule for review or modification of the [arbitrator's] decision," and "[a]ny Court review of the arbitrator's decision shall be as set forth in paragraph 27 below." Pet. App. 15a.[1]

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[1] The parties' arbitration rules do not call for arbitration under the FAA, the Oregon Arbitration Act, the rules of the American Arbitration Association or any other organization. Instead, Rule 1 specifies that "[t]he parties intend for this arbitration to be conducted . . . according to the rules of the

In sum, the parties clearly did not rely upon the FAA as the authority for their Agreement or its review. Instead, they relied on the enforceability of their Agreement as a district court order and a binding contract entered as a result of court-ordered mediation. The parties' understanding of their agreement as a binding contract is reflected in various parts of the Agreement. For example, paragraph 9 of the Agreement specifies that "[t]he parties agree that this [A]greement will bind both parties, and waive any challenge they may have to the procedures set forth in this Agreement." Pet. App. 7a. Paragraph 28 of the parties' rules for the arbitration further provides that "[t]he parties agree that no party shall contest in any court of law the arbitration rules set forth herein as contrary to any law, regulation, rule or guideline." Pet. App. 16a.

2. The parties proceeded to arbitration under their Agreement. The arbitration was conducted as a court-annexed proceeding. The parties' submissions and the arbitrator's rulings were consistently filed under the district court caption and case number. *See, e.g.*, Jt. App. 4, Docket #66, 68, 69. In addition, neither party sought a stay of the district court's proceeding, and no stay was entered.

Following the arbitration, the arbitrator issued findings of fact and conclusions of law as the Agreement required. Following the Agreement's specified procedure, Hall Street filed with the district court a motion for review of the award under paragraph 27 of the Agreement. Jt. App. 4, Docket #70. In so doing, Hall Street relied exclusively on the court's order, stating:

Federal Rules of Civil Procedure and Local Rules of the U.S. District Court for the District of Oregon." Pet. App. 9a.

> Pursuant to Paragraph 3 of the Stipulation and Order Regarding Agreement to Arbitrate entered on October 23, 2001, and Paragraphs 24 and 27 of the Rules for Arbitration attached as Exhibit A thereto, plaintiff ... hereby requests review of the Arbitrator's rulings in this matter and moves for an Order vacating, modifying and/or correcting the Arbitrator's Findings of Fact and Conclusions of Law.

Jt. App. 4, Docket #70, at 2.

3. Mattel opposed Hall Street's motion to vacate. Jt. App. 5, Docket #73. Mattel did not dispute that the court's order was the source of the court's authority to vacate. Nor did Mattel argue that the court lacked authority to correct errors of law. In fact, Mattel filed a "contingent appeal" in which Mattel itself challenged various arbitral findings of fact and conclusions of law pursuant to the agreed judicial review provision. Jt. App. 5, Docket #73, at 26-27.

Throughout its brief, Mattel – like Hall Street – relied solely on the court's order establishing the parties' Agreement as the source of authority for enforcing a contractual standard of judicial review. For example, in its opposition brief, Mattel asserted: "The parties agreed by a contract confirmed by a Court Order to the parameters of the Court's jurisdiction to review the decision of the Arbitrator[.]" Jt. App. 5, Docket #73, at 12. Mattel never suggested to the district court that anything other than the parties' Agreement governed judicial review of the award.

4. After the district court reviewed the award and concluded that it resulted from legal error, the court remanded the award to the arbitrator. Pet. App. 39a-

58a. And, after the arbitrator issued his amended award, *id.* at 59a-85a, both parties continued to rely on the Arbitration Agreement and its judicial review provision. In its motion for judicial review, Mattel challenged virtually all of the arbitrator's conclusions of law and findings of fact pursuant to the Agreement's judicial review provision. Jt. App. 8, Docket #93, at 1. Hall Street similarly identified the Agreement as governing the district court's review. Jt. App. 7, Docket #91, at 6.

5. After the district court entered the amended arbitration award as its judgment, Mattel appealed. For the first time, on appeal, Mattel invoked the FAA and argued that the FAA prohibited enforcement of the court's order effectuating the Agreement. Mattel asserted that "under the [FAA], the court had no power to reverse or remand the matters decided by the arbitrator." Jt. App. 16, Mattel's Brief (10/6/03), at 12-13.

Hall Street disputed Mattel's characterization of the court's order as an arbitration agreement under the FAA. Indeed, in its jurisdictional statement and in addressing the standard of review, Hall Street specifically disagreed with Mattel's contention that "[the Ninth Circuit Court had] jurisdiction pursuant to 9 U.S.C. § 16." Jt. App. 16, Hall Street's Brief (12/19/03), at 20. *See id.* at 27 (Hall Street "disagrees with Mattel's contention that this case arises under the FAA").

Hall Street also challenged Mattel's assertion that the FAA prohibited enforcement of the order. Hall Street pointed out that, unlike the parties in *Kyocera*, the parties here were already in litigation when they entered into the Arbitration Agreement and "[b]oth parties wanted the district court judge to retain ultimate jurisdiction to decide the case." *Id.* at 28.

Hall Street further argued that, unlike *Kyocera*, the district court here approved the parties' Agreement and entered it as an order. *Id.* at 31. Hall Street emphasized that the judicial review provision was part of an enforceable contract and court order, and that Mattel should be held to its bargain. *Id.* at 29.

Hall Street reiterated those views in its petition for rehearing en banc, expressly arguing that the judicial review provision in the Agreement was enforceable as a binding contract and court order, and stressing that neither party had relied on the FAA as the authority for the Agreement or its enforcement. Jt. App. 17, Hall Street's Petition for Rehearing En Banc (12/7/04), at 2 ("neither the parties nor the District Court intended or contemplated that the [FAA's] review provisions would have any application to the mid-litigation form of case management and disposition which occurred in this case"); *id.* at p. 9 ("[N]either the parties nor the District Court judge intended or contemplated that the 'arbitration' which occurred in this case would be governed by the FAA.").[2]

6. In its petition for certiorari, Hall Street assigned error to the Ninth Circuit's ruling that the FAA prescribed the exclusive grounds for vacating, modifying, or correcting an arbitration award. Hall

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[2] After remand, the case was litigated under the Ninth Circuit's mandate, and Hall Street argued that the arbitration award should be vacated even under the FAA's standards of judicial review. Jt. App. 19, Hall Street's Brief (2/12/06). The district court agreed, Pet. App. 127a, but the court of appeals reversed 2-1, Jt. App. 156-58. In seeking certiorari after that ruling, however, the petition was limited to whether the court of appeals' earlier ruling – that the FAA prohibited enforcement of the parties' agreed-upon and court-ordered judicial review provision – was correct.

Street framed the issue not as whether the FAA *authorizes* federal courts to enforce parties' agreements providing for more expansive judicial review, but as whether the FAA *precludes* federal courts from enforcing such agreements. *See* Pet. Br. i. Hall Street posed the question that way because the Ninth Circuit's application of the FAA is the only impediment to the district court's enforcement of the parties' judicial review provision. Hall Street has consistently maintained that the district court had ample authority to vacate and modify the arbitration award under the Agreement and the court's order approving that procedure. Hall Street merely asks this Court to set aside the FAA roadblock that the Ninth Circuit erected to the district court's enforcement of the parties' Agreement for judicial review.

ARGUMENT

The FAA provides procedural mechanisms for the enforcement and judicial review of arbitration awards governed by that Act. *See* 9 U.S.C. § 9-11. The FAA does not, however, require parties to employ its procedures. *See id.* § 9 (the court may enter judgment on arbitration award only "[i]f the parties in their agreement have agreed"); *see also* Pet. Br. 23, Pet. Reply Br. 5 (same).

In this case – other than arguing to this Court that the broad principle of enforceability under FAA § 2 supports enforcement of the parties' Arbitration Agreement – Hall Street has not relied on the FAA as authority for the district court's review of the award.[3]

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[3] Hall Street acknowledges that it has argued that the FAA could be interpreted affirmatively to authorize parties to deviate from the standards under § 10 for judicial review. *See, e.g.*, Pet.

Mattel, on the other hand, has relied solely on the FAA in arguing that the Agreement's judicial review provision is unenforceable, and the Ninth Circuit invalidated the provision on that ground alone. Any other argument by Mattel has been waived. Thus, if the FAA does not prohibit enforcement of that Agreement, this Court should reverse the judgment below.

Unless the FAA is a bar, the district court's order effectuating the parties' agreement for non-binding arbitration with legal-error review is enforceable. When parties agree to non-binding arbitration with legal-error review as their chosen means of alternative dispute resolution in the course of litigation – as the parties did here – federal courts have both statutory authority and inherent judicial power to review such an award. Moreover, when parties opt to waive review and enforcement of arbitration awards under the FAA – as the parties did here – common-law remedies remain available for enforcement of arbitration awards. The parties here relied on the enforceability of their judicial review provision as a court order and a valid contract. Hall Street has never waived its reliance on those

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Br. 23-24. But that is just the flip side of Hall Street's primary argument which consistently has been that the FAA does not *prohibit* enforcement of judicial review provisions that differ from those under § 10. Hall Street's position that the FAA does not *prohibit* enforcement is reflected in the wording of its question presented on certiorari. Pet. Br. i. That position also is reflected in Hall Street's arguments in its opening and reply brief that "Mattel has the burden to show that the FAA affirmatively prohibits arbitration agreements preserving judicial authority to review for legal error, or that such agreements otherwise are unenforceable as a matter of law." Pet. Reply Br. 3; *see also* Pet. Br. at 3 ("the FAA does not prevent courts from enforcing arbitration agreements stipulating to judicial review for legal error").

authorities in contending that the FAA does not present a barrier to the enforcement of the parties' judicial review provision.

I. AMPLE AUTHORITY OUTSIDE OF THE FAA EXISTS FOR ENFORCEMENT OF THE PARTIES' JUDICIAL REVIEW PROVISION.

A. The District Court Has Authority to Enforce the Agreement's Judicial Review Provision.

The district court had ample statutory authority outside of the FAA – as well as inherent judicial power – to enforce the Agreement's judicial review provision.

The Federal Rules of Civil Procedure ("Rules") confer upon federal courts an impressive array of tools to resolve disputes. With the parties' consent, for example, Rule 53 empowers a district court to appoint a special master to make findings of fact and recommended conclusions of law. Fed. R. Civ. P. 53(g)(3), (4). Similarly, under Rule 16, a district court has broad discretion to utilize alternative dispute resolution with the parties' consent. *See, e.g.*, Fed. R. Civ. P. 16(c)(9), (16) (authorizing court to "take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule" and authorizing court action on "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action"). As the 1993 Rules Committee noted:

> [T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and *nonbinding arbitration* that can lead to consensual resolution of the dispute

without a full trial on the merits.

Fed. R. Civ. P. 16, Advisory Comm.'s Note, 1993 Amend. (emphasis added).[4] The non-binding arbitration proceedings with legal-error review that the parties and court agreed to here are comfortably encompassed within this nonexclusive list of means of avoiding "a full trial on the merits." Enforcement of the parties' agreement for non-binding arbitration with legal-error review – akin to a special-master proceeding under Rule 53 – clearly falls within the scope of the district court's authority under Rule 16.

Like the Federal Rules, Oregon's local district court rules authorize a wide range of alternative dispute resolution methods. District of Oregon Local Rule 16.4 provides that "[t]he parties may agree to pursue mediation, *or any other form of alternative dispute resolution*, at any time in the life of a civil case." D. Or. L. R. 16.4(e)(1)(A) (emphasis added).[5] By its terms, that broad authorization includes an agreement for non-binding arbitration with judicial review of issues of law.

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[4] "[I]n ascertaining [the] meaning [of the Rules] the construction given to them by the Committee is of weight." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

[5] Congress authorized district courts to enact local rules under the Rules Enabling Act of 1934. *See* 28 U.S.C. § 2071(a). In the Alternative Dispute Resolution Act of 1998 ("ADR Act"), Congress specifically directed district courts to enact local rules promoting alternative dispute resolution methods. *See* 28 U.S.C. § 651(b). Under the ADR Act, a district court may not refer cases to arbitration when more than $150,000 is in dispute, see 28 U.S.C. § 654(a), but is not prohibited from allowing parties to enter voluntary agreements to arbitrate disputes. *See* 3 *Moore's Federal Practice* § 16.53[2][d][i] (Matthew Bender 3d ed.) (discussing exemptions from mandatory ADR referrals).

Finally, this Court long has recognized the inherent power of courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *see also Chambers v. NASCO*, 501 U.S. 31, 47 (1991) (rejecting argument that Federal Rule of Civil Procedure 11 limits judicial authority to impose sanctions, stating "we do not lightly assume that Congress has intended to depart from established principles such as the scope of the court's inherent power" (internal quotation marks and citations omitted)). The district court's process in this case also is authorized under the district court's inherent authority as "an independent system for administering justice to litigants who properly invoke its jurisdiction." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (quoting *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)). That inherent power includes the authority to utilize different tools to facilitate disposition of cases.

Federal courts, for example, have inherent authority to appoint auditors or commissioners when necessary due to the complexity of facts or the volume of evidence, to aid the judge in performing his or her duties. *See Ex parte Peterson*, 253 U.S. 300, 306-07, 312-14 (1920). Federal courts have similar authority to enter consent decrees effectuating parties' agreements. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Critically, that power extends to orders authorizing the consensual arbitration of disputes. *Heckers v. Fowler*, 69 U.S. 123, 127-29 (1865) (upholding the federal courts' inherent authority to appoint a referee to determine all issues, with the parties' consent).

Included within the federal courts' inherent powers is the authority to enforce parties' judicially-approved agreements to utilize these different tools through normal judicial processes. As this Court stated in the analogous context of consent decrees: "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew v. Hawkins*, 540 U.S. 431, 440 (2004); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (consent decree is an agreement "that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.").

Courts have routinely made consensual agreements to arbitrate enforceable as orders of the court. In *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121-22 (1924), for example, this Court explained that courts have authority to enter agreements to arbitrate as court orders to "be enforced in courts of the United States by any appropriate process." In *Heckers*, 69 U.S. at 133, this Court also entered judgment on an arbitration award "pursuant to the order of the court and the agreement of the parties" to submit the matter to arbitration.

Here, the parties entered their arbitration agreement as the result of court-ordered mediation. Jt. App. 3, Docket #60. In agreeing to arbitrate, the parties stipulated that the arbitrator's legal conclusions would be non-binding and subject to district court review, akin to a special master proceeding under Rule 53. Pet. 16a. At the parties' request, the district court entered the parties' Agreement as a court order. Pet. App. 8a.

In sum, enforcement of the parties' Agreement, entered as a court order, constitutes a permissible

exercise of the court's statutory authority and inherent judicial power.

B. The Agreement's Judicial Review Provision Is Enforceable Under Common Law.

In the alternative, the federal courts have authority to enforce the Arbitration Agreement under ordinary common law principles. At common law, a party generally brought a contract cause of action or a suit in equity to enforce or set aside an arbitration award. *Red Cross Line*, 264 U.S. at 121 ("[I]f the arbitration award has been made, effect will be given to the award in any appropriate proceeding at law, or in equity."); *see also* Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from their Coexistence*, 46 MINN. L. REV. 819, 848-61 (1962) ("Sturges & Reckson").[6] Although courts generally declined to review arbitration awards for legal error at common law, *see, e.g.*, *Burchell v. Marsh*, 58 U.S. 344, 349 (1855), that general rule did not apply when the parties expressly agreed otherwise. *See Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) ("If the parties wish to reserve the law for the decision of the court, they may

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[6] Courts in equity had authority to enforce common-law arbitration awards without requiring parties to file suit when the parties agreed to submit the matter to arbitration during pending civil litigation. *See* Sturges & Reckson, 46 MINN. L. REV. at 849 ("There is an exception to [the requirement of filing suit for enforcement of an arbitration award] in most jurisdictions when the matter in dispute in a pending civil litigation is submitted to arbitration by adequate agreement of the parties. By this exception the award, though not complying with any arbitration statute, can be returned to the court for entry of judgment thereon unless the award is set aside for cause.").

stipulate to that effect in the submission; they may restrain or enlarge its operation as they please."); *see also* Pet. Reply Br. 3; Oral Arg. Tr. 45:3-9; 47:14-18 (counsel for Mattel) ("[The FAA] still let the parties have the review through common law if they want it.").[7]

Here, the parties entered into a contract providing that the district court "shall vacate, modify or correct any award" that contains legal error. Pet. 16a. It is undisputed that the parties' agreement was voluntary and otherwise valid as a matter of contract law. As such, the parties' judicial review provision is enforceable at common law.

II. IN MAKING AND ENFORCING THEIR AGREEMENT, THE PARTIES RELIED ON THE DISTRICT COURT'S CASE MANAGEMENT AUTHORITY AND THE COMMON-LAW.

When they entered into their Arbitration Agreement, the parties clearly did not view that Agreement as restricted or governed by the FAA's

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[7] The FAA supplements common-law remedies to confirm, vacate, or modify arbitration awards. *See* Sturges & Reckson, 46 MINN. L. REV. at 826 ("There is near consensus of American decisions on the precise point that the arbitration statutes of different jurisdictions do not displace common-law arbitration. The statutes are regarded as adding another method of arbitration. Parties may choose one or the other." (footnote omitted)); *see* Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, 1 *Federal Arbitration Law* §5.5, at 5:15 (1994) (same). *See also Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration"). Arbitration awards also were enforceable at law or equity as a matter of Oregon common law. *Jacob v. Pac. Exp. Lumber Co.*, 297 P. 848, 856 (Or. 1931).

judicial review provisions. In reporting that their court-ordered mediation resulted in an arbitration agreement, the parties specifically informed the court that they had agreed to "contract arbitration" – as opposed to statutory arbitration – and they expressly retained the court's authority to review the legal issues decided. Jt. App. 46. By entering into a binding agreement for "contract arbitration," the parties plainly understood that remedies for enforcement of the parties' agreement for judicial review existed outside of the FAA.

The terms of the Agreement also reflect the parties' reliance on the district court's authority under Rule 16 and Oregon Local District Court Rule 16.4 – as well as the court's inherent power – to allow non-binding arbitration as a tool to promote efficient resolution of the parties' case. Indeed, the Agreement was the product of the district court's order to mediate under Rule 16. Although the parties did not settle their entire dispute, the Arbitration Agreement was a settlement agreement that submitted the remainder of the claims to non-binding arbitration with legal-error review. In asking the district court to make their settlement agreement a court order, the parties clearly understood that the district court had the authority to enforce its own order as it would a consent decree. Indeed, botl. Mattel and Hall Street cited only the district court's order in asking the court to review the arbitrator's legal conclusions (and, in the case of Mattel, some of the arbitrator's findings of fact). *See* Jt. App. 5, Docket #73, at 26-27; Jt. App. 4, Docket #70, at 2.

III. PETITIONER HAS NOT WAIVED RELIANCE ON AUTHORITY OUTSIDE OF THE FAA FOR ENFORCING THE JUDICIAL REVIEW PROVISION OF THE ARBITRATION AGREEMENT.

A review of Hall Street's arguments throughout this litigation makes clear that Hall Street never waived its reliance on authority outside of the FAA for the enforcement of the Agreement's judicial review provision. Indeed, the opposite is true. Before this Court, Hall Street primarily has invoked the FAA – specifically, § 2 – for the proposition that the parties' judicial review provision is an enforceable contract which may not be invalidated simply because it appears in an arbitration agreement. *See, e.g.*, Pet. Br. 21-22; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (§ 2 prohibits "singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts" (internal citation and quotation marks omitted)). In arguing that the FAA does not bar enforcement of the Agreement's judicial review provision, Hall Street has consistently claimed that this provision is enforceable as a valid contract and district court order. *See, e.g.*, Pet. Br. 14.

Hall Street's arguments before the lower courts reflect that same focus. Mattel's assertions to the contrary are contradicted by the record.

Mattel asserts – without record citation – that "the relief that [Hall Street] sought and initially received from the district court . . . was vacatur under Section 10 of the arbitrator's original award and entry of a modified award under Section 11 in its favor." Resp. Br. 43. Mattel also claims – again, without record citation – that Hall Street seeks vacatur and

modification "in a cause of action under Section 9 to confirm an award." *Id.* Both statements are wrong.

Before the district court, Hall Street – like Mattel – cited only paragraphs 24 and 27 of the parties' "Rules of Arbitration" as the authority for the district court to review and vacate the original arbitration award. It did not seek vacatur under § 10. Jt. App. 4, Docket #70, 71. Hall Street also never brought a "cause of action under Section 9" to confirm the arbitration agreement. Hall Street sought judicial review and vacatur of the award only under the district court's order effectuating the Arbitration Agreement. *Id.* At no point before the district court did Mattel ever challenge the district court's authority to enforce its own order.

After the district court reviewed and vacated the initial award, Mattel appealed. In that appeal, Mattel argued only that the FAA prohibited the enforcement of the parties' judicial review provision. Jt. App. 16, Mattel's Opening Brief (10/16/03), pp. 12-13. In opposing that view, Hall Street asserted that the judicial review provision was subject to enforcement as a court order effectuating the parties' contract. Jt. App. 16, Hall Street's Answering Brief (12/19/03), p. 20. Hall Street specifically disclaimed reliance on the FAA's judicial review provisions, stating "there is no question but that neither the parties nor the District Court intended or contemplated that the [FAA] review provisions would have any application to this mid-litigation form of case management and disposition which occurred in this case." Jt. App. at 17, Hall Street's Petition for Rehearing En Banc (12/7/04), at 2. For its part Mattel never argued to the Ninth Circuit that the judicial review provision was unenforceable for any reason other than the FAA. And, that was the sole

ground for the Ninth Circuit's vacatur of the district court's judgment. Jt. App. 141-42.

After remand, the district court concluded that the arbitration award was subject to vacatur under § 10. Pet. App. 127a-128a. Mattel again appealed to the Ninth Circuit. Because the Ninth Circuit already had ruled that enforcement of the parties' judicial review provision was barred by the FAA (making that ruling the law of the case), Hall Street did not pursue this point on Mattel's second appeal. But, Hall Street's arguments, made in the first appeal to the Ninth Circuit, preserved those arguments for this Court's review and demonstrate that Hall Street did not rely on the FAA to enforce the award, but instead relied on other grounds. *See Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (on review, this Court "consider[s] all of the substantial federal questions determined in the earlier stages of the litigation[,] for it is settled that [the Court] may consider questions raised on the first appeal, as well as those that were before the Court of Appeals upon the second appeal." (internal quotation marks and citations omitted)).

After the Ninth Circuit again reversed the district court's judgment, Hall Street filed its petition for writ of certiorari. Mattel claims that Hall Street "fram[ed] the question [presented to this Court] in terms of the district court's authority under the FAA" and abandoned any arguments to this Court "that the expanded review provision of this agreement to arbitrate was not governed by the FAA." Resp. Br. at 43, n. 12. Like its characterization of the proceedings below, this characterization of Hall Street's petition is demonstrably inaccurate.

Because both Mattel and the Ninth Circuit had identified the FAA as the only barrier to enforcement of the Agreement, Hall Street asked this Court to

decide whether the FAA precluded enforcement of the parties' judicial review provision. That question was predicated on Hall Street's position that the Agreement's judicial review provision otherwise was enforceable. Indeed, this is the presumption upon which the case was granted – that if the FAA did not bar enforcement of the parties' Agreement and the court's order, the Agreement and order should be enforced.

In its briefing before this Court, Hall Street consistently has claimed that the parties' judicial review provision is enforceable as a matter of the district court's authority to issue a court order effectuating that agreement. In its opening brief, for example, Hall Street argued to this Court:

> [T[he Ninth Circuit's refusal to enforce the parties' agreement in this case "place[d] an unwarranted limitation upon the power of district courts to control their own cases." . . . Just as a court might approve the use of a special master to facilitate resolution of a case, the district court here approved of the use of an arbitrator to achieve that same goal. . . . Nothing in the FAA – nor in any other substantive law – precluded the court from retaining that authority when both parties clearly and unmistakably agreed to it.

Pet. Br. 36 (citations omitted); *see also id.* at 12-13 (arguing that parties' judicial review provision is a contract subject to enforcement on the same terms as other contracts).

Mattel also contends that Hall Street waived the right to enforce the Agreement's judicial review provision outside of the FAA by failing to seek review of the Ninth Circuit's severability holding. *See* Oral

Arg. Tr. 38:11-13. But that argument puts the cart before the horse. There is no severability issue unless the judicial review provision is unenforceable. Hall Street has argued all along that the provision is enforceable under the agreement and court order, which are empowered by the Federal Rules of Civil Procedure, inherent court authority, and common-law contract and arbitration principles. The Ninth Circuit held that the FAA effectively preempts all of these sources of authority and bars the enforcement of the judicial review provision. If that ruling is incorrect, which it is for the reasons stated in Hall Street's briefs to this Court, then no issue of severability exists, and the district court properly enforced the judicial review provision by correcting the legal error in the arbitrator's award.

Throughout this litigation, Hall Street consistently has maintained that the FAA does not preclude the enforcement of the parties' judicial review provision. Because the FAA is no impediment, the district court's order effectuating the parties' agreement for non-binding arbitration with legal-error review is enforceable. The Ninth Circuit's contrary decision should be reversed.

CONCLUSION

For the reasons set forth in Hall Street's opening and reply briefs and above, the decision below should be reversed.

Respectfully submitted,

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